



**U.S. Citizenship
and Immigration
Services**

(b)(6)

DATE:

OFFICE: TEXAS SERVICE CENTER

FILE:

APR 04 2013

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition denied by the Director, Texas Service Center (Director). It is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The appeal will be rejected as untimely filed.

The petitioner was an information technology services company. It sought to permanently employ the beneficiary in the United States as a software engineer and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This section of the Act provides for immigrant classification to members of the professions holding advanced degrees whose services are sought by employers in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on January 28, 2009. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed at the Department of Labor (DOL) on May 5, 2008, and certified by the DOL on September 9, 2008. The ETA Form 9089 specifies that the minimum requirements for the proffered position are either:

- an associate's degree in science, mathematics, information systems, business, computers, engineering, electronics, or accounting, or a foreign educational equivalent, and 24 months of experience in the job offered or as a programmer analyst (Part H, boxes 4, 4-B, 6, 7, 7-A, 9, 10, and 10-B), *or alternatively*
- a bachelor's degree in one of the above fields of study, or a foreign educational equivalent, and 24 months of work experience (Part H, boxes 8, 8-A, 8-C, and 9).

On April 22, 2009, the Director issued a decision denying the petition on the ground that the labor certification (ETA Form 9089) is not valid for classification under section 203(b)(2) of the Act. While the advanced degree professional classification sought in the petition requires either a master's degree or a bachelor's degree and five years of progressive experience in the specialty, the labor certification requires only an associate's degree or a bachelor's degree and two years of experience. Thus, the immigrant classification sought in the petition does not correlate with the educational and experience requirements of the labor certification, as required by the regulation at 8 C.F.R. § 204.5(k)(4)(i).

The petitioner must appeal an unfavorable decision within 30 days of service. See 8 C.F.R. § 103.3(a)(2)(i). If the unfavorable decision was mailed, the appeal must be filed within 33 days. See 8 C.F.R. § 103.8(b). The filing date is the actual date of receipt at the location designated for filing. See 8 C.F.R. § 103.2(a)(7)(i). The appeal must be signed and submitted with the correct fee. *Id.* An untimely appeal must be rejected as improperly filed. See 8 C.F.R. § 103.3(a)(2)(iii)(B)(1).

Neither the Act nor the regulations grant the AAO authority to extend the time limit.

The director issued the decision denying the petition on April 22, 2009. The director properly gave notice to the petitioner that it had 33 days to file the appeal. The petitioner filed the Form I-290B, Notice of Appeal or Motion, on June 1, 2009 – which was 40 days after the decision was issued. Accordingly, the appeal is untimely.

If an untimely filed appeal meets the requirements of a motion to reopen or reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. *See* 8 C.F.R. § 103.3(a)(2)(v)(B)(2). The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the Director, Texas Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii). As required by 8 C.F.R. § 103.3(a)(2)(ii) and (iii), the Director reviewed the appeal prior to forwarding it to the AAO, and did not conclude that it met the requirements of a motion or otherwise warranted favorable action.

The untimely appeal will be rejected by the AAO pursuant to 8 C.F.R. § 103.3(a)(2)(iii)(B)(1).

ORDER: The appeal is rejected.